U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals
INDEX

File: [redacted]

Date: SEP 10 1998

In re: [redacted]

IN EXCLUSION PROCEEDINGS

APPEAL AND MOTION

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EXCLUDABLE: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - No valid immigrant visa

APPLICATION: Asylum; withholding of deportation

This case involves cross-appeals by the applicant and the Immigration and Naturalization Service from the Immigration Judge's decision dated July 14, 1997, in which he denied the applicant's request for asylum and withholding of deportation pursuant to sections 208(a) and 243(h)(1) of the Immigration and Naturalization Act, 8 U.S.C. §§ 1158(a) and 1253(h)(1), respectively; and ordered that the applicant be excluded and deported from the United States, albeit, not to Algeria, unless or until implementing regulations of the United Nations Convention Against Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture)[1] would allow for such an order of exclusion and deportation. The Immigration Judge found that although the applicant has a well-founded fear

[1]United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984)

[redacted]

of persecution, he is statutorily ineligible for relief based on his assistance in and incitement of persecution. The Immigration Judge's finding regarding assistance in persecution is based on the applicant's conduct as a leader in the Islamic Salvation Front (FIS), and the affiliation between the FIS and the Armed Islamic Group (GIA).

The applicant appealed, arguing, among other things, that the Immigration Judge erred: 1) in finding that statements made after the fact can be incitement of persecution; 2) in finding that "silence" vis-a-vis the violence of others can be incitement or assistance in persecution; 3) in finding that in failing to condemn the violence of others, he incited or assisted in the persecution of others; 4) in finding expressions of condolences to victims of bombings to be evidence of taking part in persecution; and, 5) in finding mere affiliation with a terrorist organization sufficient to render the applicant excludable.

The Service cross-appealed, arguing that the Immigration Judge erred in finding that it would be unfair to hear classified information the Service wanted to present as evidence. The Service also argued that the Immigration Judge erred in making a finding based on the Convention Against Torture, specifically arguing that the Immigration Court is without jurisdiction to make a finding based on this Convention. On June 25, 1998, the Board heard oral arguments in this case.[2] The applicant's appeal will be sustained. The Service's cross-appeal will be sustained. The case will be remanded for expeditious review of the classified evidence and the entry of a new decision.

I. SUMMARY OF EVIDENCE AND PROCEEDINGS

The applicant is a 43-year-old native and citizen of Algeria. He was previously admitted to the United States as a graduate student from January 1980 through December 1984. The applicant returned to Algeria after his studies and worked first as a research assistant at the Algerian National Nuclear Institute and later, from January 1986 until January 1992, as a professor of nuclear physics at the University of Science and Technology in Algiers (App. Exh. 1).

A. Procedural History

On April 7, 1993, the applicant filed an affirmative asylum application in the Chicago Asylum Office (INS Exh. 3). During the pendency of the applicant's asylum application, on at least seven separate occasions, the INS granted the applicant advance parole to travel abroad (INS Exh. 6). Each time the INS granted the applicant advance parole, it was to carry on his political activities as head of the FIS Parliament in Exile (INS Exh. 149, 150; Tr. at 10). The identity and activities of the applicant as an elected parliamentarian and media spokesperson of the FIS have at all times been known to the Government of the United States.

The Service denied the applicant's asylum claim in October 1996. On December 5, 1996, the Service revoked the applicant's parole status (INS Exhs. 152, 153). On December 6, 1996,

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[2]We note that over the objection of the Service's counsel, we have considered the June 12, 1998, document submitted by the United Nations High Commissioner for Refugees (UNHCR).

[redacted]

the Service took him into custody. On December 10, 1996, the Service instituted exclusion proceedings against the applicant.

In January 1997, the United States Department of State in its advisory opinion stated, among other things, that Mr. Haddam's fears were credible, and that he demonstrated a legitimate fear of persecution from both the Algerian government and the GIA (INS Exh. 142). The advisory opinion states that the Algerian government has provided no evidence to support the allegations in the warrant it had issued for Mr. Haddam's arrest and imprisonment (INS Exh. 142). At a Pretrial Conference on March 21, 1997, the Service stipulated that Mr. Haddam has a well-founded fear of persecution in Algeria (Tr. at 86). The applicant conceded that he is excludable (I.J. at 3).

B. The Applicant's Involvement in Algerian Politics

The applicant testified that he has been part of the Algerian Islamic movement for the past 20 to 25 years (Tr. at 175). The applicant is a member of the FIS (App. Exh. 1; Tr. at 175). In 1990, in Algeria's first ever municipal elections, the FIS won 54% of the popular vote. In 1991, the FIS won the first round of what are considered to be fair and free elections, by 47% of the popular vote (App. Exh. 56). On December 26, 1991, the applicant was elected to the parliament in Algeria (INS Exh. 2). In December of 1991, before the final round of elections in which the FIS was expected to win many of the remaining parliamentary seats, the president was put under house arrest, the elections were annulled, and the army took power (App. Exh. 56). The FIS was banned, and its headquarters and all of its offices around the country were closed. Its senior leadership and key activists were arrested, and the previously elected municipal FIS governments were shut down. Many FIS supporters were tortured and killed by the Algerian military government (App. Exh. 56).

The applicant was removed from elected office in January 1992 (INS Exh. 3). He fled Algeria on March 3, 1992, leaving behind his wife and four children, who could not leave Algeria safely with him at that time (App. Exh. 1; INS Exhs. 2, 3). He entered the United States as a visitor on December 10, 1992 (INS Exh. 3). On December 23, 1992, the rest of his family legally entered the United States (App. Exh. 1).

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The applicant is currently the head of the FIS parliamentary delegation in exile (INS Exh. 3).[3] This group represents the FIS in exile after the 1992 coup d'etat. The applicant testified that he became the leader of the FIS in exile in April 1992, by default because the president, Dr. Abassi Madani, and Vice President, Ali Ben Hidj, of the FIS were incarcerated in Algeria (Tr. at 257-59). The first president of the National Executive Committee, Sheikh Mohamedi Said was jailed and eventually assassinated in 1995, and the second president, Mr. Hachani, was jailed without trial after the coup d'etat. The applicant testified that the president, although incarcerated, is still considered the leader of FIS, and is aware of the FIS platform.

The applicant acts as the FIS spokesperson in the United States. He asserts that his responsibility is to explain FIS policy and encourage other countries to recognize what is occurring in Algeria (Tr. at 195-96, 200). However, the applicant is not a spokesperson for the FIS in Algeria because he claims to have neither the access nor influence in Algeria to serve as a spokesperson there (Tr. at 196). He communicates with his party through communiques issued from the United States, and asserts that he cannot communicate through the news media in Algeria because all independent parties have been banned from issuing newspapers.

C. Evidence Regarding the Applicant's Ties to the Armed Islamic Group

The applicant claims to have never been a member of, or had official contact with, the GIA or the Islamic Salvation Army (AIS) (Tr. at 175-76, 212, 292). The applicant testified that he did not want the FIS to have an "armed wing or any relationship with any armed group" (Tr. at 182).[4] However, the main armed Islamic groups in Algeria joined together to form one armed group in May 1994, and the FIS has had contact with these groups, although the applicant claims that the FIS never became part of the GIA (Tr. at 176-78). The applicant testified that only certain members, not the entire FIS party, joined the GIA (Tr. at 176-77, 180, 262,

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[3]Mr. Rabeh Kebir, who is now in Germany, is head of the Executive body of the FIS abroad and used to be a member of the National Executive Committee. Mr. Kebir announced a new, seven-member Executive Committee, but the applicant is not a part of that committee (Tr. at 263-64). The applicant testified that Mr. Kebir was banned from the FIS before he did this. There is a struggle for power between the leaders in exile. The applicant stated that Mr. Kebir was willing to make an agreement with the military regime which would not require the military to leave. An article in the APS Diplomat Recorder, dated November 25, 1995, quotes the applicant as saying in response to a letter written to the military government by Mr. Kebir, which sought to compromise and end the armed rebellion, "[t]his treason will never be forgotten in the collective conscience of our people" (Tr. at 266, 270; INS Exh. 130). The applicant pointed out that the quote was taken from a military government news source. He said his response to Mr. Kebir's letter did not oppose dialogue, only the recognition of the illegitimate military regime.

[4]The applicant insisted that the Islamic Salvation Army is not the armed wing of the FIS, but he admitted that others consider it to be (Tr. at 333-34). He does not believe that a political party should have an armed wing (Tr. at 334).

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411-412). The applicant admitted that the GIA was part of the mujahidin[5] between May 1994 and November 1995, and that his party supported them at that time (Tr. at 273).[6] "I supported [the GIA] because we had a pact. We backed the armed struggle as long as it was for the sake of freeing our people, for a return to free elections, and against acts of terrorism" (Tr. at 301; INS Exh. 154).[7] He is quoted as saying there is "no difference between the armed groups and the FIS, we all work for the same objective" (Tr. at 340-341; INS Exh. 170).

Prior to November 1995, the applicant stated that GIA did not engage in the killing of civilians, journalists, women, or family members of security forces (Tr. at 279-80). When asked who was killing these people, the applicant blamed terrorist elements within the GIA and the government (Tr. at 280, 302-03; INS Exh. 154). The applicant testified that he would not have supported the GIA if he had understood its ideology at the time (Tr. at 308). Beginning in 1995, most of those from the FIS who joined the GIA were assassinated (Tr. at 262). The applicant was living in the United States at that time, and he alleges that he disassociated himself with the GIA. The applicant testified that he has always opposed an alliance with terrorist groups. The applicant testified that he never accepted a position with the GIA, and that, in fact, the GIA has sentenced him to death (Tr. at 184-85; App Exhs. 25, 26).

D. The Applicant's Testimony Regarding the Situation in Algeria

The applicant professes to believe that free elections between many parties in Algeria should exist (INS Exh. 86). He has indicated that he rejects the Sudanese and Iranian models as a way to achieve Islamic Government because he believes that a stable political system cannot be spawned from revolution or a coup d'etat (Tr. at 396-98). The applicant testified that since the time of the coup d'etat, he has considered Algeria to be in a state of war (Tr. at 253). The applicant organized and attended two conferences aimed at bringing all political parties from Algeria together to discuss a peaceful resolution to the current situation. The conferences were

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[5]The applicant stated that the term "mujahidin" does not apply to people who use terrorism, because the term does not permit the killing of civilians (Tr. at 234, 254). He described mujahidin as "a group of Algerians who are opposing military, those who took over the institution of the state by force in order to go back to the free elections" (Tr. at 254).

[6]By support, he asserted that he supports politically the right of people to protect their political institutions, which is "what the GIA supported." The Immigration Judge pointed out that the United States Department of State "is aware of past expressions of support by Haddam for the [GIA]. . . . [H]e is recently quoted as saying: 'it is well documented that until November 1995, I did strongly support the GIA. . . . [W]e backed the armed struggle as long as it was for the sake of freeing our people, for a return to the free elections, and against acts of terrorism.'" Middle East Quarterly, Vol. III, No. 3, September 1996.

[7]An article in the Mideast Mirror states, "Haddam had earlier endorsed the 'dissolution' of the FIS and its 'merger' into the GIA, as announced by two FIS leaders in hiding inside Algeria last month" (INS Exh. 55). This is not true according to the applicant (Tr. at 392). He said he never endorsed the dissolution of FIS or its merger into the GIA, and to his knowledge, there was no official statement from FIS regarding this issue.

[redacted]

held outside of Algeria because the Algerian government would not participate. At the Rome Conference in 1995, the parties developed a platform for a political solution (App. Exh. 38), including the rejection of violence and the establishment of a democratic government. The applicant signed the Rome platform on behalf of the FIS (Tr. at 216). The second conference was held in Stockholm, Sweden, in January 1996. Both conferences were aimed at establishing an agreement among the political parties for the implementation of free elections. All of the main political parties signed the agreement, and the applicant signed on behalf of the FIS. The Algerian government rejected the agreements and the cease-fire offer by the parties.

In his testimony, the applicant repeatedly and unequivocally condemned violence against noncombatants (Tr. at 241-42, 286, 407-08, 411, 427, 431).[8] However, he supports the right of people to defend their elected institutions (Tr. at 254).[9] The applicant made a distinction between terrorism and freedom fighting (Tr. at 298-99; INS Exh. 154). He stated that the FIS made a concession to fight against the military regime to enable free elections (freedom fighting), but will not accept the murder of civilians who are not taking direct part in the government operations through the use of force (terrorism) (Tr. at 204, 298-99; App. Exh. 16; INS Exh. 86). He stated that terrorists murder civilians, and the "mujahidin" targets only those people associated with the military regime. The applicant stated that if members of the FIS killed civilians, "they would deserve what the law [would] give" (Tr. at 435). The applicant claims that with regard to the right to resort to an armed struggle against an illegitimate government, his position is completely consistent with the Fourth Geneva Convention, specifically, and with international law in general.

In an interview with Greg Noaks of the Washington Report on Middle East Affairs, the applicant admitted saying that targets for the mujahidin are "all those who materially support the junta -- whether Algerians or foreigners" (INS Exh. 93). He explained that "materially supports" means those who give "material support to the military regime" (Tr. at 283). On re-direct examination, he said it is his duty to defend the interest of the Algerian people, and therefore oppose those who are supporting the military.

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[8]He submitted to the Court actual communiques of the FIS, which constitute the official published positions of the organization, all of which condemned violence against noncombatants (App. Exhs. 16, 18, 26, 27). The applicant believes that if force is necessary, it can only be used against those who actively support the regime through the use of force. Regarding his condemnation of the killing of "innocent people," he is quoted as saying "we need to agree on the meaning of the word 'innocent'" (INS Exh. 97). He also allegedly said that "pseudo-intellectuals" and "pseudo-democrats" who arrested democracy or began its defeat "are not innocent" (INS Exhs. 97, 170). The applicant testified that he issued, in the name of the FIS, communiques indicating that the "FIS is opposed to and condemns the attacks against individuals who express themselves through exercising their right to freedom of thought and expression. Woman, writers, politicians, journalists and scholars" (Tr. at 205-06; App. Exh. 18).

[9]In an interview with Paris Liberation, dated May 6, 1994, the applicant said that "orders were given to people to organize locally and target all those who were illegally clinging to power" (INS Exh. 97).

[redacted]

E. The Applicant's Public Statements Regarding Violence

The Service argues that the applicant has engaged in inciting and condoning violence in several instances. The first accusation arises in regard to the assassination of Dr. Mahfoud Boucebci, a psychiatry professor in Algeria (INS Exh. 80). The applicant testified that he was shocked to hear of Mr. Boucebci's death in 1993 (Tr. at 231). He was told by his FIS contacts that Dr. Boucebci might have been assassinated because he was involved in the torture of FIS members, however, the applicant denied knowing who killed Dr. Boucebci (Tr. at 231). He stated that he did not justify the killing, and in fact, he called for an independent commission to review the killing (Tr. at 236). He stated that he may have said during the interview that the killing was a "sentence" for Dr. Boucebci's involvement in the torture of FIS members, however, he denied taking responsibility for or justifying the killing (Tr. at 235-37).[10]

The Service asked the applicant whether he condemned the killing of five French citizens in Algeria in August of 1994. The applicant admitted that he did not condemn the attack (Tr. at 287). He testified that he was waiting for the French government to explain what its military was doing in Algeria, and that he did not consider them civilians (Tr. at 287, 408). Because the French government has not offered an explanation, he has not condemned the attack (Tr. at 408).

Another incident involved a car bomb that exploded in a crowded street in Algiers on January 30, 1995 (Tr. at 237; INS Exhs. 49, 61, 62). The applicant denied that the FIS was responsible for the bombing (Tr. at 313; INS Exhs. 49, 61, 62). However, the applicant testified that his contact in Algeria informed him that the bombing was aimed at the police station at the end of the block, and that the bomb had accidentally exploded before reaching its destination (Tr. at 240). The applicant stated that the police station is the "main center of torture in Algeria" (Tr. at 237). In reaction to the bombing, the applicant released a communique on behalf of the FIS which stated: "Amongst basic principles of Jihad in Islam is the forbidding of the killing of children, women, elderly, and innocents in general, as well as those who forbid the torture of the human person, regardless of race or religion" (App. Exh. 24). In an interview with National Public Radio regarding the bomb, the applicant stated, "we cannot blame everything on the government's forces. This happened. Accidents happened. We have to -- and the freedom fighters have to take this responsibility" (INS Exhs. 49). Algiers Radio Network reported that the applicant stated that civilian bystanders in the Algiers bombing faced "bad luck" (INS Exhs. 61, 62).

When an FIS official, Sheikh Ahmed Zaoui, was arrested in Belgium in a round-up of suspected Moslem extremists, the applicant issued an FIS statement noting that Zaoui's arrest

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[10]The applicant was also quoted on October 18, 1993, as follows: "Who are these so-called intellectuals? Among them are members of the National Consultative Council, which has usurped the place of the people's elected representatives, persons who wrote murderous editorials, and those who, through psychiatry, advised torturers on how to obtain confessions." "[T]he Algerian people have chosen as targets only those individuals upon whom the military-security system in Algeria relies. We know them one by one, and they are not innocent people" (Exh. 92).

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coincided with the visit to Belgium by the Algerian junta's foreign minister. The statement accused Belgium of joining efforts "to silence the representatives of the Algerian people and prevent them from exercising their fundamental rights. . . ." In reference to Belgium, the statement read: "[o]ur people shall remember this complicity" (INS Exh. 120). The applicant indicated that he meant that such complicity would have consequences regarding future relations between Belgium and Algeria (Tr. at 390-91; App. Exh. 48).

F. The Testimony of Other Witnesses

Dr. Andre Bartoli is a professor at Columbia University and a member of the St. Egidio Society, an international Catholic organization (Tr. at 481). His group was asked to facilitate dialogue among Algerians, because after the coup in Algeria, there was no forum in which to have safe dialogue (Tr. at 489). He stated that eleven Algerian representatives from 90% of the voters in the 1991 elections attended the Rome Conference in November 1994, held at the St. Egidio office in Rome (Tr. at 487-88). The witness testified that at the Rome Conference the parties determined that a solution in Algeria required the support of the FIS, and that they would design a new democratic government.

The witness testified that the applicant was the highest official in the FIS who could attend the Rome Conference, and that he repeatedly emphasized his desire for a peaceful resolution to the Algerian crisis (Tr. at 489, 492; App. Exh. 3). Before the witness met the applicant, he thought that the applicant was close to the GIA, but changed his mind after meeting him at the conference and seeing that the applicant was committed to dialogue (Tr. at 492). The witness testified that he has spoken with the applicant many times, and had no hesitation when asked to testify on the applicant's behalf (Tr. at 507).[11] He has no personal knowledge of the applicant being involved in the persecution of others (Tr. at 537). He said that the applicant always argued against the killing of civilians (Tr. at 514).

Dr. Bartoli testified that a second meeting was held in January 1995, in Stockholm (Tr. at 494). He testified that there were three main actors at this meeting: the former National Liberation Front (FLN), the Socialist Forces Front (FFS), and the FIS. The applicant played a crucial role in this platform, according to the witness (Tr. at 497). During the meeting, the applicant had direct contact with FIS leadership in Algeria through telephonic communications (Tr. at 497). The platform that resulted was a document of peaceful means and was designed to be an offer to the Government of Algeria as a sign of peace. The Algerian government reacted negatively and portrayed the St. Egidio Society as a threat to Algeria. In February 1995, members of the Society began receiving death threats from the regime and extremist Islamic groups (Tr. at 502).

The court took telephonic testimony of Louisa Hanoon from Algeria. However, during the direct examination, the court had to discontinue the testimony due to technical difficulties with the overseas telephone connection. The court granted the Service's motion to strike the

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[11]The witness did express his concern over publicly supporting dialogue in the Algerian crisis because doing so put him in "a very dangerous position" (Tr. at 507).

[redacted]

testimony of this witness because the Service did not have an opportunity to cross-examine her. The court allowed the applicant to submit an affidavit from this witness, however, none was filed.

II. THE IMMIGRATION JUDGE'S DECISION

On July 14, 1997, the Immigration Judge denied the applicant's request for asylum and withholding of deportation. The parties conceded that the applicant faces a well-founded fear of persecution if he were to be returned to Algeria based on his political opinion, and thus met the criteria for asylum pursuant to section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a). The Immigration Judge found that the applicant has a well-founded fear of persecution. Moreover, the Immigration Judge also found that the applicant met the criteria for withholding of deportation pursuant to section 243(h) of the Act, 8 U.S.C. § 1253(h), in that he had shown that there is a clear probability that he would be persecuted if returned to Algeria. Thus, the Immigration Judge found that the applicant was eligible for both asylum and withholding of deportation. However, the Immigration Judge found the applicant to be barred from eligibility for relief because he ordered, incited, assisted, or otherwise participated in the persecution of others on account of race, religion, nationality, membership in a particular social group, or political opinion. See 8 C.F.R. § 208.13(c).

First, the Immigration Judge found that the applicant had "assisted in the persecution of innocent civilians by advocating certain terroristic acts aimed at harming certain people who were not actively supporting the military government" (I.J. at 17) (emphasis added). The Immigration Judge concluded that the "evidence of record demonstrates that the applicant has in word and deed advocated the persecution of others" (I.J. at 20). Thus, the Immigration Judge found that because of the applicant's position of influence and power, the applicant's purported condonation of terrorist violence against certain individuals is incitement of persecution (I.J. at 20). The Immigration Judge reasoned that because of his leadership position, his acceptance of or failure to condemn such acts constituted support of those acts.

The Immigration Judge also based his finding on the fact that the applicant "was at least affiliated with and supported the GIA during 1994-1995" (I.J. at 19). During that time frame, GIA is known to have committed terrorists acts. The Immigration Judge concluded that the applicant had "condoned" acts of violence perpetrated by the GIA. The court concluded:

> Notwithstanding this demeanor and the assertions to the contrary, evidence of record demonstrates that the applicant has in word and deed advocated the persecution of others. The subtlety of the applicant's responses and the reasonable inferences strongly suggest that the applicant has condoned the death of certain individuals who are "non-combatants." The Court finds that because of the applicant's position of influence and power, the applicant's condonation of terrorist violence against certain individuals is incitement of persecution. See [United States v. Koreh, 59 F.3d 431 (3d Cir. 1995)].
>
> Even if the applicant did not express explicit support for the persecution of others and the terrorist acts committed in Algeria, as a leader his acceptance of such acts, is support in and of itself.

[redacted]

(I.J. at 20) (emphasis added).

Second, the Immigration Judge indicated that he would hear ex parte, in camera testimony of an FBI agent with regard to classified information gathered by the United States government about the applicant. However, the Immigration Judge ultimately decided not to hear this testimony because of the "lack of fairness of such testimony" (I.J. at 22). The Immigration Judge decided that because of the Service's position that the highly sensitive nature of the classified information made it impossible for the Service to provide a summary of the evidence to the applicant, "fairness demands that [the Immigration Court] rely solely on the record in reaching its decision" (I.J. at 22).

Finally, the Immigration Judge addressed the issue of the United Nations Convention Against Torture, and its impact on this case. Article 3 of the Convention Against Torture prohibits a signatory from returning a person to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." The Immigration Judge determined that it was "clear" that the applicant "would, indeed, be tortured by the military regime or opposition parties if he were returned to Algeria" (I.J. at 23). However, the Immigration Judge decided that he did not have jurisdiction to prevent the exclusion or deportation of the applicant because the Department of Justice had not developed procedures to implement Article 3 of the Convention Against Torture. Accordingly, the Immigration Judge ordered the applicant excluded and deported, "but not to Algeria unless or until the implementing regulations of the United Nations Convention Against Torture provide for such action" (I.J. at 24).

III. THE APPLICANT'S MOTION TO DISMISS

The applicant moved for a summary dismissal of the Service's cross-appeal, alleging that it was untimely filed, that the Notice of Appeal was not served on the applicant's counsel, and that the brief in support of the cross-appeal was not timely filed. See 8 C.F.R. §§ 3.1(d)(1-a)(i)(E), 3.3(a)(1), and 3.3(c)(1). The Immigration Judge's decision was rendered on July 14, 1997. Therefore, the Notice of Appeal (NOA) was due on or before August 13, 1997. See 8 C.F.R. §§ 3.3(a)(1) and 3.38. The date stamp on the Service's NOA indicates that it was received at the Appeals Processing Unit of the Board of Immigration Appeals on August 13, 1997. Therefore, we find that the appeal was timely filed.

Moreover, the Certificate of Service indicates that the Service did serve a copy of the NOA on the applicant's counsel by mail. We conclude that the Service has demonstrated compliance with the requirements of 8 C.F.R. § 3.3(a)(1). We also reject the applicant's argument that the Service's brief regarding the cross-appeal, which was filed on December 10, 1997, was not timely filed. By notice dated October 2, 1997, the deadline for the Service's brief was set as December 10, 1997. Therefore, we find that the brief was timely filed.

The applicant also argues that the issues on appeal, i.e., the applicability of the Convention Against Torture and the use of classified evidence, should be summarily dismissed on substantive grounds for violating 8 C.F.R. §§ 3.1(d)(1-a)(i)(B) and (C). The regulations provide that the Board may summarily dismiss any appeal or portion of any appeal in which the only reason for the appeal specified by the party concerned involves a finding of fact or a conclusion of law that was conceded by that party at a prior proceeding. 8 C.F.R. § 3.1(d)(1-a)(i)(B).

[redacted]

While it is true that the Service may have admitted certain facts underlying the Immigration Judge's final determination, we disagree that its admissions are determinative of the issue of law underlying the applicability of the Convention Against Torture.

The regulations also provide that the Board can summarily dismiss an appeal from an order that granted the party concerned the relief that it requested. 8 C.F.R. § 3.1(d)(1-a)(i)(C).

Although the Service prevailed before the Immigration Judge to the extent that the applicant was found to be ineligible for asylum, the Service was not allowed to introduce classified evidence.[12]

We agree that these important and substantive issues should be addressed. For this reason, and because our power to summarily dismiss an appeal is a discretionary one, we deny the applicant's request that we summarily dismiss the appeal.

IV. THE "PERSECUTOR OF OTHERS" BAR

The Immigration Judge and both parties agreed that the applicant met the basic eligibility requirements for a grant of asylum and withholding of deportation. However, Congress has precluded a grant of asylum and withholding of deportation to "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." See sections 101(a)(42)(B), 208(a), and 243(h)(2)(A) of the Act, 8 U.S.C. § 1101(a)(42)(B). Thus, the primary issue before us is whether the applicant "ordered, incited, assisted, or otherwise participated" in the persecution of others.

A. Burden of Proof

The applicable regulation provides that an "applicant shall not qualify as a refugee if he ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. If the evidence indicates that the applicant engaged in such conduct, he shall have the burden of proving by a preponderance of the evidence that he did not so act." 8 C.F.R. § 208.13(c). Thus, the regulations appear to require the Service to provide evidence which indicates that the applicant has engaged in the prohibited conduct. Once such evidence has been provided, the burden is on the applicant to prove by a preponderance of the evidence that he did not so act.

For us to conclude that a leader in a group, such as the applicant, had engaged in or assisted in the persecution of others by means of his leadership, we would require some volitional action on the part of the alien that resulted in the persecution of another as that term is defined in our law. This volitional action could be speech, or possibly silence in the right situation. Moreover, there must be a clear and recognizable nexus between the action of the alien and the persecution suffered by the victim. If the Service presents evidence that demonstrates that the applicant has engaged in such conduct, then the applicant would have the burden of proving that he did not so act.

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[12]Our decision regarding the Immigration Judge's handling of the classified evidence is discussed in section V below.

[redacted]

B. The Effect of Current Conditions in Algeria

The parties do not dispute that there is an ongoing civil conflict in Algeria. See Matter of Maldonado-Cruz, 19 I&N Dec. 509 (BIA 1988) (noting that in analyzing a claim of persecution made in the context of a civil war, it is necessary to examine the motivation of the group threatening harm). The United States Department of State's report on Algeria entitled Country Reports on Human Rights Practices for 1995, indicates that "[t]he Army's cancellation of the electoral process in 1992 effectively denied citizens the right to change their government by legislative election" (App. Exh. 55, at 359). The most recent State Department report on Algeria reiterates this point. Specifically, it indicates that Algerian "[c]itizens do not have the effective right peacefully to change their government" (Country Reports on Human Rights Practices for 1997, Algeria, p. 1403).[13] See generally Matter of Izatula, 20 I&N Dec. 149 (BIA 1990).[14]

This Board has held previously that activities directly related to military objectives in a civil war do not constitute "persecution" within the meaning of the Act. Matter of Rodriguez-Majano, 19 I&N Dec. 811, 815 (BIA 1988) (noting that in analyzing a claim of persecution made in the context of a civil war, it is necessary to examine the motivation of the group threatening harm). There, we stated,

> [H]arm which may result incidentally from behavior directed at another goal, the overthrow of a government or, alternatively, the defense of that government against an opponent, is not persecution. In analyzing a claim of persecution in the context of a civil war, one must examine the motivation of the group threatening harm. Matter of Maldonado-Cruz, supra. A finding of persecution requires some degree of intent on the part of the persecutor to produce the harm that the applicant fears in order that the persecutor may overcome a belief or characteristic of the applicant. See Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). Thus, the drafting of youths as soldiers, the unofficial recruiting of soldiers by force, the disciplining of members of a rebel group, or the prosecution of draft dodgers are necessary means of achieving a political goal, but they are not forms of persecution directed at someone on account of one of the five categories enumerated in section 101(a)(42)(A) of the Act. See, e.g., Rodriguez-Rivera v. United States, INS, 848 F.2d 998 (9th Cir. 1988); Kaveh-Haghigy v. INS, 783 F.2d 1321, 1323 (9th Cir. 1986); Sarkis v. Sava, 599 F. Supp. 724 (E.D.N.Y. 1984); Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988); Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); Matter of Maldonado-Cruz, supra; Matter of A-G-, 19 I&N Dec. 502 (BIA 1987). We would

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[13]The Board can take administrative notice of recent or changed country conditions. See Matter of S-M-J-, Interim Decision 3303, at 9, n.2 (BIA 1997). Thus, we take administrative notice of the latest State Department report on Algeria. We specifically note that this report is not materially different from the earlier report submitted as an exhibit by the applicant. The new report simply echos the conclusions reached in the 1995 report.

[14]In Matter of Izatula, 20 I&N Dec. 149, 153-54 (BIA 1990), the Board clarified the general rule that efforts to overthrow a lawfully constituted government amount to criminal rather than political activity, and held that the respondent's activities against the "defacto" government in Afghanistan were political in nature.

include in this list the engaging in military actions, the attacking of garrisons, the burning of cars, and the destruction of other property as actions outside the limits of the term "persecution."

Id., at 814-15.

Thus, harm that "results incidentally" from behavior directed at another goal is not persecution. Consequently, advocacy or support of a change of government, or failure to condemn incidental harm that is a byproduct of efforts to accomplish such a change, cannot be considered to be assistance in the persecution of others. The applicant argues that his conduct has been in support of a legitimate political goal, i.e., the overthrow of what he considers to be the illegitimate government in Algeria, and he stresses that he has always opposed violence against noncombatants. The parties do not dispute that there is an ongoing civil conflict in Algeria. We must examine whether the applicant's conduct as the FIS leader-in-exile in the midst of the civil conflict amounts to "assistance in persecution."

C. Persecution of Others Based on the Applicant's Public Statements

Although military actions in the context of a civil war are actions beyond the limits of the term "persecution," a terrorist attack which targets specific individuals based upon their political opinion or another statutorily protected reason would constitute persecution within the meaning of the Act. See generally Matter of McMullen, 19 I&N Dec. 90 (BIA 1984). While acknowledging that there is no evidence that the applicant ordered or committed terrorist acts himself, the Immigration Judge cited United States v. Koreh, 59 F.3d 431 (3d Cir. 1995), for the proposition that certain speech or other conduct, if advocated by a leader or someone with influence, which are intended to persecute particular people on the basis of their race, religion, nationality, membership in a particular social group, or political opinion, are considered persecution. Thus, the leader, although he may not have participated in the actual harm to those persecuted, can still be considered a persecutor for incitement of such activity. Id. The Immigration Judge concluded that some actions (including terroristic acts) incited and advocated by the applicant were specifically targeted at people whom the applicant and his party sought to punish for their view or background. Specifically, the Immigration Judge found that the applicant "had assisted in the persecution of innocent civilians by advocating certain terroristic acts aimed at harming certain people who were not actively supporting the military government" (I.J. at 17).

As an example, the Immigration Judge pointed to the fatal stabbing of a psychiatry professor, Mahfoud Boucebci, in suburban Algiers. The applicant, who was allegedly shocked when he heard of Dr. Boucebci's death, called for an independent commission to review the killing. However, he admitted that his FIS contacts told him that Dr. Boucebci might have been assassinated because he was involved in the torture of FIS members. The applicant also admitted during his testimony that he might have referred to Dr. Boucebci's death as a "sentence," but denied that he was a civilian, because he had allegedly advised security forces on methods of extracting confessions through torture. The Immigration Judge pointed out that the applicant had failed to show that Dr. Boucebci had in any way aided the security forces, and concluded that Dr. Boucebci "appears to be one of the many academics targeted by extremist groups" (I.J.

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at 17). The Immigration Judge concluded that there was adequate evidence in the record to show that the applicant had "advocated terrorist attacks on intellectuals" (I.J. at 18). We disagree.

While it is unclear from the record whether Dr. Boucebci was an innocent victim of a politically motivated killing, we do not find that the applicant's after-the-fact comments in any event can be seen as assistance in, or incitement of, the persecution of Dr. Boucebci or any other intellectual. The applicant expressed his view that Dr. Boucebci was not innocent because he had advised security forces on methods of extracting confessions through torture, but there is no indication that he espoused the belief that Dr. Boucebci or intellectuals as a class should be targeted. Moreover, rather than condoning the killing outright, the applicant called for an independent commission to review the killing. In addition, the record shows that the applicant consistently expressed his view that noncombatants should not be targeted. To constitute persuasive evidence that the applicant actually assisted in persecution, the Service must do more than point to the applicant's conjecture that Dr. Boucebci's death might have been a "sentence" for his role in advising security forces on methods of extracting confessions through torture. We emphasize that the Service did not present any such evidence, nor did the Immigration Judge find, that the applicant ordered the attack on Dr. Boucebci or any other intellectual.

The Immigration Judge also found that the FIS has targeted foreigners. "FIS warned that its supporters will attack all those who materially support the junta -- whether Algerians or foreigners" (INS Exh. 93). The applicant defined "materially support" as giving arms to the military.[15] In this context, the Immigration Judge found it significant that the applicant failed to condemn the 1995 slaying of five French citizens, including three embassy guards, for which the GIA had claimed responsibility (INS Exh. 157). However, the applicant indicated that he would not condemn these murders until the French government explained what French military officers were doing in Algeria. Given the lack of evidence that the applicant ordered these murders, took responsibility for them, or explicitly condoned them, we are unable to find that he assisted in persecution simply because he refused to condemn them until the French government explained the presence of French military officers in Algeria. We also note that it was approximately at this time that the applicant publicly distanced himself from the GIA.

The Immigration Judge pointed to "other instances in which the applicant assisted in the persecution of others" (I.J. at 18). For example, the applicant was asked during testimony if the FIS was responsible for the January 30, 1995, car bomb that exploded in Algiers and killed many innocent people. The applicant stated that FIS members in Algeria told him that they were not responsible. However, the Immigration Judge found that the applicant formally apologized to the families of the victims, and he concluded that "[i]t appears, that he and his party are responsible for the car bombing, or at least supported the people who perpetrated the crime." We do not find that the record supports the finding that an apology constitutes an admission of responsibility.

The applicant admitted that after hearing about the bombing he was told that it was aimed at the police station, and that it had accidentally exploded before reaching its destination. However,

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[15]The Immigration Judge also pointed to evidence suggesting that the FIS "and its allied organizations such as the GIA" have directed terrorism against foreigners in order to drive away foreign investment (INS Exh. 129).

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he denied that he or the FIS was directly responsible, only noting that "the freedom fighters[16] have to take . . . responsibility" [for the innocent civilians who were killed.] We find these words to be no more than an acknowledgment that in fighting against the junta, some innocent civilians were, unfortunately, killed. Moreover, we note that the only official pronouncement made by the applicant on behalf of the FIS regarding this bombing was a communique which spoke out against the killing of innocent civilians.[17] We find that there is an inadequate nexus between the applicant's words and the bombing for us to conclude that he assisted in the persecution of others based on this act.[18]

The Immigration Judge's decision relies heavily on the Third Circuit's decision in United States v. Koreh, supra. However, we find that this case is distinguishable from Koreh in material ways. In Koreh, the denaturalization defendant, Ferenc Koreh, had worked in the early 1940s, as the "Responsible Editor" of Szekely Nep, a newspaper that repeatedly printed anti-Semitic articles which specifically supported and encouraged the Hungarian government's steps to enact or to enforce various anti-Jewish measures consistent with the persecution of Jews that was occurring in Hungary at that time.

In 1950, Koreh applied for and received a visa to the United States under the Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009 (1948), as amended by Pub. L. No. 81-555, ch. 262, 64 Stat. 219 (1950) (the "DPA"). In connection with his application, Koreh signed an affidavit stating that he had never been a member of or participated in any movement which is or has been hostile to the United States, and that he had never advocated or assisted in the persecution of any person because of race, religion or national origin.[19] In June 1989, the United States sought to revoke Koreh's naturalized citizenship

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[16]This event happened during the time that the FIS and the GIA were aligned.

[17]The communique on behalf of the FIS stated: "Amongst basic principles of Jihad in Islam is the forbidding of the killing of children, women, elderly, and innocents in general, as well as those who forbid the torture of the human person, regardless of race or religion" (App. Exh. 24).

[18]We also observe that an attack on a police station in the context of civil strife does not necessarily amount to persecution within the meaning of the Act. See Matter of Rodriguez-Majano, supra, at 814-15 (noting that because harm which may result incidentally from behavior intended to overthrow an illegitimate government, i.e., engaging in military actions, the attacking of garrisons, the burning of cars, and the destruction of other property, is outside the limits of the term "persecution"); see generally Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988) (noting that dangers which arise from the nature of employment as a policeman in an area of domestic unrest do not support a claim of a well-founded fear of persecution). The record does not reflect that there was any intent to "persecute" the innocent civilians who died as a result of the bombing attack on the police station.

[19]Section 13 of the DPA provided, in part: "No visas shall be issued under the provisions of this Act . . . to any person who is or has been a member of or participate in any movement hostile to the United States or the form of government of the United States, or to any person who

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pursuant to 8 U.S.C. § 1451(a), inter alia, as "illegally procured" on the basis of an invalid DPA visa. The court concluded that there was "ample basis in the undisputed facts for the district court to conclude that Koreh's involvement in the publication of anti-Semitic articles by

Szekely Nep assisted in the persecution of Hungarian Jews by fostering a climate of anti-Semitism in Northern Transylvania which conditioned the Hungarian public to acquiesce, to encourage, and to carry out the abominable anti-Semitic policies of the Hungarian government in the early 1940s." United States v. Koreh, supra, at 440.

Although the Immigration Judge found that the applicant had assisted in persecution because of his public comments (or lack thereof), in each instance cited, the applicant's public statements were a reaction to an incident that had occurred in Algeria made from abroad. We are not persuaded that these public statements concerning incidents in Algeria amount to incitement or approval of the "persecution" of persons protected by the Act's five grounds. In contrast to the applicant's conduct, as the "Responsible Editor," Koreh publicly disseminated a long series of articles which not only condoned the anti-Semitic actions that were already taking place, but also encouraged the Hungarian government's steps to enact or to enforce various additional anti-Jewish measures. Id., at 435. In addition, while Koreh relied on a public newspaper intended to whip up hostility among its audience toward the Jewish residents, the government controls the media in Algeria, and the applicant testified that he has no access to the press in that country (Tr. at 196-99).

Finally, we note that in Koreh, the defendant only had to be found to have "advocated" persecution. United States v. Koreh, supra, at 438. We note that the term "advocacy" was never included in the "persecutor of others" bar in the 1980 Refugee Act. In 1978, Congress drafted the Holtzman Amendment, the predecessor to the persecutor of others bar, which sought to exclude from admission into the United States aliens who had persecuted others while also facilitating the deportation of aliens who had been admitted into the United States. The deportation and exclusion grounds of sections 241(a)(19) and 212(a)(3)(E) of the Act, 8 U.S.C. §§ 1251 and 1182(a)(3)(E), were passed to ensure that persons who entered the United States by means other than the DPA would not also be entitled to procure or retain immigration benefits if they had assisted Nazi Germany in persecutorial Acts. See Judiciary Committee on Immigration and Nationality Act, House Report No. 95-1452 (1978), reprinted in 1978 U.S.C.C.A.N. 4700. However, in passing these new provisions, Congress consciously and deliberately made critical changes from the bars appearing in the DPA.

The deportation and exclusion provisions found in sections 241(a)(19) and 212(a)(3)(E) of the Act applied to anyone who "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion" in collaboration with the Nazi government and its allies. The Nazi collaboration requirement was deleted and the "membership in a particular social group" language was added when this provision was incorporated into the 1980 Refugee Act. The legislative history makes it clear that the former language of "advocacy" and "membership" was deliberately deleted when the DPA

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[19](...continued)
advocated or assisted in the persecution of any person because of race, religion, or national origin." DPA § 13, 64 Stat. at 227.

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language was folded into these new sections. See Laipenieks v. INS, 750 F.2d 1427, 1431-32 (9th Cir. 1984) (concluding that the deportation ground under section 241(a)(19) of the Act contrasts with the DPA bar by requiring "some personal activity involving persecution"). It is these two sections which are the direct predecessors to the Refugee Act's "persecutor of others" bar. Basic principles of statutory construction compel the conclusion that since Congress used "advocacy" and "membership" in prior and similar legislation, its omission of those terms in the later Refugee Act provision was deliberate. See Fedorenko v. United States, 449 U.S. 490, 512 (1981).

Thus, we conclude that the Koreh decision is factually and legally distinguishable from the instant case. First, the Immigration Judge erroneously relied on the DPA's "advocacy" in persecution language in concluding that the Koreh decision rendered the applicant ineligible for asylum. Second, the substance of the speech in these two cases is significantly different; the defendant in Koreh was the editor of a publication which promoted the persecution of Jews, whereas the Service has not identified public statements made by the applicant which amount to incitement of persecution of protected persons. Finally, we disagree with the Immigration Judge's broad reading of Koreh as applied to this case; that the applicant's silence in response to acts which he had not planned or authorized amounted to "assistance in persecution."

D. Persecution of Others Based on the Applicant's Ties to the GIA

The Immigration Judge found that the applicant "was at least affiliated with and supported the GIA during 1994 [and] 1995, because he distinctly admitting during testimony that he supported the GIA" during those times (I.J. at 19). The Immigration Judge pointed out that the GIA committed many terroristic acts aimed at persecuting certain individuals during that time, and he expressed his disbelief at the applicant's claims that he was then unaware that the GIA was engaged in terrorism.

The Immigration Judge acknowledged that the record suggests that in 1995 the FIS took some steps to distance itself from attacks on civilians, but it did so inconsistently, and failed to stop any of the attacks. The Immigration Judge pointed to the incident in which three civilians died when GIA members highjacked a French Airbus with the intent of blowing it up over Paris as the "clearest example of support by the applicant for the GIA" (I.J. at 19). The Immigration Judge found that "there is a nexus between the applicant and this terrorist act to reach the finding that the applicant condoned this act of violence, and thus is held to have condoned terrorism" and that "because of the applicant's position of influence and power, the applicant's condonation of terrorist violence against certain individuals is incitement of persecution" (I.J. at 19-20). Thus, he held that even if the applicant did not express explicit support for the persecution of others and the terroristic acts committed in Algeria, as a leader his acceptance of such acts, is support in and of itself" (I.J. at 20). We disagree.

The Board has previously held that "mere membership in an organization, even one which engages in persecution, is not sufficient to bar one from relief, but only if one's action or inaction furthers that persecution in some way. It is the objective effect of an alien's actions which is controlling." Matter of Rodriguez-Majano, supra, at 814-15 (BIA 1988) (citing Laipenieks v. INS, 750 F.2d 1427, 1435 (9th Cir. 1985); Matter of Fedorenko, 19 I&N Dec. 57, at 69 (BIA 1984); see also Fedorenko v. United States, supra, at 750 n.34). Although the record

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supports a finding that the FIS and the GIA were in some way affiliated during 1994 and 1995, i.e., both seeking to overthrow the government of Algeria, the record does not support a finding that the applicant's actions or inaction had an objective effect, i.e., that they furthered the persecution of others in any way. See Matter of Rodriguez-Majano, supra.

Moreover, we find no nexus between the French Airbus hijacking and the applicant which would lead us to conclude that he condoned this act. He simply refused to believe that the GIA was responsible. The record clearly demonstrates that in addition to his repeated public statements disapproving of the use of violence against noncombatants, the applicant apparently severed ties with the GIA when he became convinced that the GIA was out of control and targeting civilians with random acts of terroristic violence. Thus, we do not find that the applicant engaged in or assisted in persecution because of his or the FIS's tangential past connection with the GIA. If mere membership in an organization that engages in persecution is insufficient to bar an alien from relief, then membership in an organization with ties to another organization which engages in persecution is certainly too tenuous a basis upon which to find that an alien is barred from relief. Matter of Rodriguez-Majano, supra. We also do not find that the applicant can be held responsible for terrorist activities committed by the GIA during the brief period that the groups were aligned, solely because of his leader-in-exile position with the FIS.

The evidence produced in this case is too attenuated to support the conclusion that the applicant "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 101(a)(42)(B) of the Act. Because the evidence provided by the Service did not indicate that the applicant had engaged in such conduct, we find that the applicant never had the burden of proving by a preponderance of evidence that he did not so act. To conclude that a person in a leadership position engaged in conduct that assisted in the persecution of others merely through the power of speech, we would require some volitional action on the part of the alien which resulted in the persecution of another as that term is defined in our law. This volitional action could be speech, or possibly silence in the right situation. Moreover, there must be a clear and recognizable nexus between the action of the alien and the persecution suffered by the victim. Because the facts of this case do not meet these requirements, we conclude that the applicant, based on the record we have reviewed, is not barred from eligibility for asylum by the "persecutor of others" bar. For this reason, the applicant's appeal will be sustained.

V. CLASSIFIED INFORMATION OFFERED BY THE SERVICE

On February 3, 1997, the Service filed a Notice of Intent to Use Classified Evidence under the Foreign Intelligence Surveillance Act (FISA), ex parte in camera (App. Br., Att. 1). Specifically, the Service wanted to present the testimony of an agent of the Federal Bureau of Investigation (FBI) regarding the contents of phone calls secretly recorded by the government. The applicant's counsel moved to discover the classified evidence, alleging that the contents of the phone calls would be exculpatory and that the government had not met its burden of proving the evidence was properly classified, and therefore arguing that the applicant had an absolute right to its production (Tr. at 588-89). The Immigration Court heard arguments on the motion for ex parte, in camera testimony, and took the motion under advisement, giving the parties the opportunity to brief the issue. On April 9, 1997, the Immigration Judge granted the motion, and

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he reviewed a submission by the government in his chambers (Tr. at 611).[20] The submission was not served on counsel for the applicant at that stage of the proceedings. Thereafter, the applicant filed an interlocutory appeal with the Board of Immigration Appeals (BIA). The Immigration Judge held in abeyance the reception of this classified evidence pending the outcome of the interlocutory appeal. On June 18, 1997, the BIA declined to accept the interlocutory appeal, and the record was returned to the Immigration Judge without further action.

The Immigration Judge decided to refrain from hearing the testimony that the Service wanted to submit ex parte and in camera "because of the lack of fairness of such testimony" (I.J. at 22).[21] The Immigration Judge reached his decision because the Service had informed him that it was unable to provide the applicant with a summary of the classified information because of its highly sensitive nature. The applicant, however, contends that the classified information, apparently the records of telephone conversations that were recorded by the government, is exculpatory. Because the Service refused to provide a summary to the applicant, the Immigration Judge determined that fairness demanded that he rely solely on the public record before him in reaching a decision. We conclude that this decision was, at least in part, in error.

The pertinent regulation, 8 C.F.R. § 240.33(c)(4) states:

> The Service counsel for the government may call witnesses and present evidence for the record, including information classified under the applicable Executive Order, provided the immigration judge or the Board has determined that such information is relevant to the hearing. The applicant shall be informed when the immigration judge receives such classified information. The agency that provides the classified information to the immigration judge may provide an unclassified summary of the information for release to the applicant whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its source. The summary should be as detailed as possible, in order that the applicant may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state that such information is material to the decision.

The pertinent regulation allows the Service to submit classified evidence, "provided the immigration judge or the Board has determined that such information is relevant to the hearing." See 8 C.F.R. § 240.33(c)(4). Thus, we find that the regulation contemplates, and indeed requires, the Immigration Judge to review any classified evidence submitted by the Service to determine if "such information is relevant." The Immigration Judge erred when he failed to do so. If the Immigration Judge were to review the evidence and decide that it were not relevant, obviously, he need not consider it. However, until the Immigration Judge has reviewed the Service's submission and determined its relevance in these proceedings, we find that it would be

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[20]The Immigration Judge looked at some classified information (Tr. at 611), a document which was declassified and presented to the Board and the applicant before oral argument. The Immigration Judge apparently did not, however, hear the testimony of the Service's witness from the FBI. .

[21]In his decision, the Immigration Judge indicated that he did not rely on any FISA evidence, i.e., the document he did examine, in making his decision.

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premature to make any ruling on the fundamental fairness of considering this evidence. See Matter of Grijalva, 19 I&N Dec. 713, 722 (BIA 1988) (noting that probative hearsay evidence is admissible in deportation proceedings unless its use is fundamentally unfair to the alien); 8 C.F.R. 240.33(c)(2) ("Nothing in this section [dealing with consideration of evidence offered by the Service] is intended to limit the authority of the immigration judge properly to control the scope of any evidentiary hearing.").[22] Because the Immigration Judge erred in not reviewing the classified evidence offered by the Service to determine its relevance, we conclude that it is proper to remand this case to allow him to do so. Thus, the Service's cross-appeal will be sustained, and the case will be remanded to the Immigration Court to set a hearing to consider the classified evidence on an expedited basis. The parties should be prepared to go forward with such a hearing within 15 days of the issuance of this decision.

VI. THE CONVENTION AGAINST TORTURE

Even though this case will be remanded in order for the Immigration Judge to review the classified evidence, we will address the parties' arguments regarding the Convention Against Torture. Article 3 of the United Nations Convention Against Torture, which the United States acceded to and entered into force on November 20, 1994, prohibits a signatory from returning a person to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, Art. 3 (Dec. 10, 1994). The Immigration Judge found that the applicant would be tortured by the military regime or opposition parties if he were returned to Algeria. In a Memorandum for Jan Huddle, Executive Secretary for the Immigration and Naturalization Service, released on May 7, 1997, the Department of State recommended that the applicant not be removed to Algeria upon the completion of the exclusion hearing, because he would face persecution, "if not torture" in Algeria, and this would be contrary to international obligations under the United Nations Convention Against Torture. (See Applicant's Request to Reconsider Bond filed with the Immigration Court on June 27, 1997).

Based on the evidence of record, the Immigration Judge determined that the applicant would be subjected to torture upon his return to Algeria. However, he also noted that "the Court does not appear to possess jurisdiction to prevent the exclusion or deportation of the applicant because the Department of Justice has not developed procedures to implement Article 3 of the United Nations Convention Against Torture" (I.J. at 24). We agree. In our recent precedent decision in Matter of H-M-Z, Interim Decision 3365 (BIA 1998), we concluded that there is no implementing legislation or regulations with respect to Article 3 which would delegate authority to the Immigration Judge or this Board to consider a request for relief from deportation under the Convention Against Torture. Therefore, neither the Immigration Judge or the Board has jurisdiction to consider any form of relief which the applicant might argue is available to him pursuant to the Convention Against Torture.

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[22]We note that any question of fundamental fairness might be significantly diminished if the applicant were provided a summary of the classified information.

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VII. CONCLUSION

We conclude that the Service failed to demonstrate that the applicant, either by his public statements made on behalf of the FIS or his past association with the GIA, has "ordered, incited, assisted, or otherwise participated in the persecution" of others. For us to conclude that a leader in a group, such as the applicant, had engaged in or assisted in the persecution of others by means of his leadership, we would require some volitional action on the part of the alien which resulted in the persecution of another as that term is defined in our law. Moreover, there must be a clear and recognizable nexus between the action of the alien and the persecution suffered by the victim. Because the facts of this case do not meet these requirements, we conclude that the applicant, based on the record we have reviewed, is not barred from eligibility for asylum by the "persecutor of others" bar.

We also conclude that the regulations require the Immigration Judge to review the classified evidence submitted by the Service to determine its relevance. Once he has done so, it is up to the Immigration Judge, in the first instance and within the parameters of the law, to decide how that evidence is to be used. For this reason, the record will be remanded to the Immigration Court to allow the Immigration Judge to schedule a hearing to consider the classified evidence on an expedited basis. The parties should be prepared to go forward with such a hearing within 15 days of the issuance of this decision.

Finally, we note that the effect of the Convention Against Torture on this case is controlled by our decision in Matter of H-M-V, supra. Accordingly, the following orders will be entered.

ORDER: The applicant's motion to dismiss the Service's cross-appeal is denied.

FURTHER ORDER: The applicant's appeal is sustained.

FURTHER ORDER: The Service's cross-appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing decision.

FOR THE BOARD